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N THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	No. 08 CR 888
Government,	)	
	)	Chicago, Illinois
vs.	)	
	)	May 20, 2011
ROD BLAGOJEVICH,	)	
	)	10:50 o'clock a.m.
Defendant.	)	

VOLUME 19  
TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE JAMES B. ZAGEL  
AND A JURY

For the Government:

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:50AM

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1 (The following proceedings were had out of the  
2 presence of the jury in open court:)

3 THE CLERK: 2008 CR 888, United States versus  
4 Blagojevich.

:50AM

5 MR. SCHAR: Good morning, Judge.

6 Reid Schar, Chris Niewoehner on behalf of the  
7 United States. I expect Ms. Hamilton shortly and  
8 Ms. Debra Bonamici is here to assist with the jury  
9 instructions should that be necessary this morning.

:50AM

10 THE COURT: Do we have instructions?

11 MR. SCHAR: Yes, Judge. We filed shortly,  
12 and I will hand up to Your Honor a binder that  
13 delineates them by tab.

14 (Handing documents.)

:50AM

15 THE COURT: Right.

16 Just out of curiosity, has anyone done a word  
17 count between these and the predecessors?

18 MR. SCHAR: No.

19 THE COURT: Because the machine can do it.

:50AM

20 MR. SCHAR: Yes, Judge.

21 THE COURT: Question out of idle curiosity.

:51AM

22 MS. KAESEBERG: Our request is, we just got  
23 them, they were filed earlier today, and I just  
24 received that same binder that you have. I haven't  
25 had a chance to look at them compared to the last

1 instructions, haven't had a chance to read them  
2 through yet. So I'd ask that we have some time to  
3 look them over before we have to take a position on  
4 any of them.

:51AM 5 THE COURT: What I would like you to do with  
6 respect to this one is send me, by the end of the  
7 day, a list of those to which you might have an  
8 objection so that at least I have some idea what the  
9 universe of objections is going to be. That would  
10 be very helpful.

:51AM 11 MS. KAESEBERG: Okay.

12 THE COURT: The second issue I have has to do  
13 with scheduling of the defense. And what I would  
14 like to do, but only with the consent of the  
15 government, is to address this outside the presence  
16 of the government's attorneys with the defense  
17 attorneys so that whatever surprises they have in  
18 their -- in their --

:52AM 19 MR. SOROSKY: Arsenal.

:52AM 20 THE COURT: Arsenal, that was good. I was  
21 thinking of arrows and quivers but arsenal is  
22 better.

23 MR. SOROSKY: Makes it sound a little  
24 stronger.

:52AM 25 THE COURT: Right. So I would like to do

1 that initially at the side and then we can talk  
2 about, if I have your consent.

3 MR. SCHAR: You certainly have our consent to  
4 do that, Judge. Obviously, there's a -- you have  
5 our consent to do that, without question.

6 THE COURT: And then I suspect that there  
7 will be several things that maybe we can discuss.

8 MR. SCHAR: Okay. Obviously, one of the  
9 things that the government, I'm sure you remember  
10 this from last time, there were a number of proposed  
11 witnesses last time. And I think that it never got  
12 to this point, but there were significant questions  
13 about the relevancy of many of them, or at least  
14 portions, if not significant portions of the  
15 testimony absent the defendant testifying, and even  
16 with the defendant testifying.

17 So, I, mean, obviously, the government would  
18 like prior to dragging in a bunch of witnesses that  
19 may ultimately have nothing pertinent or admissible  
20 to testify about, but we'll abide by whatever Your  
21 Honor wants to do.

22 THE COURT: Okay. We'll do this initially at  
23 the side. It will be on the record.

24 MR. SCHAR: Judge, we should stay?

25 THE COURT: Yeah.

1 (Proceedings heard at sidebar on the record.)

2 THE COURT: All right, why don't we all stand  
3 over here so we all can hear.

4 MR. SOROSKY: Let me tell you this first so  
5 you know.

6 THE COURT: Okay.

7 MR. SOROSKY: Let's divide the government  
8 allegation into say, six different allegations.  
9 First let's take the racetrack.

10 THE COURT: Okay.

11 MR. SOROSKY: We don't have any witnesses on  
12 the racetrack.

13 THE COURT: Okay.

14 MR. SOROSKY: Let's take Children's Memorial  
15 Hospital, there aren't any witnesses on Children's  
16 Memorial Hospital.

17 THE COURT: Okay.

18 MR. SOROSKY: Three, let's take the school.  
19 We may call a witness by the name of John Filan,  
20 they know who he is.

21 THE COURT: I know who he is, too.

22 MR. SOROSKY: Blagojevich's director of the  
23 budget, they interviewed him. So he and Terry would  
24 say there were budget problems.

25 THE COURT: That there were, in fact,

1 legitimate budget problems.

2 MR. SOROSKY: That there were problems.

3 THE COURT: Okay. All right.

4 MR. SOROSKY: There may be one or two  
5 lower-level employees within the Department of  
6 Budget who said that there were e-mails back and  
7 forth and telling them there were budget problems,  
8 and this and the other type of thing.

9 THE COURT: Okay.

10 MR. SOROSKY: And on the school, we may call  
11 then Congressman Emanuel's aide or Chief of Staff  
12 and that she was told there were budget problems,  
13 but with the exception of Filan, those would all be  
14 extremely short witnesses.

15 THE COURT: Right.

16 MR. SOROSKY: Okay, the next thing is --

17 MS. KAESEBERG: The tollway.

18 MR. SOROSKY: The tollway -- no, no, no, we  
19 have road builders.

20 MS. KAESEBERG: No, that's the racetrack.

21 THE COURT: Road builders; Krozel.

22 MR. SOROSKY: We may call a man by the name  
23 of Mitola. Mitola was the Chief of the Tollway  
24 Authority, the Illinois Tollway Authority.

25 THE COURT: The Chairman or the Executive

1 Director, those are the two positions they have.

2 MR. SOROSKY: The chairman, I think he's  
3 Chairman. I don't know what he is.

4 THE COURT: One guy has a full-time job and  
5 runs the tollway and then the other guy is a  
6 Chairman. But the Chairman, unlike some places, the  
7 Chairman actually has something --

8 MR. SOROSKY: Right, right. I think he's the  
9 Chairman.

10 THE COURT: So he's either the ED or the  
11 Chairman.

12 MR. SOROSKY: Right. He's one of those two.  
13 And what he would say, one of the things he would  
14 say so you know, is on the second tollway -- you  
15 know how they talk about the 1.8 and 1.5 billion  
16 dollar grant? Well, the governor did not need the  
17 legislature to approve the plan, the greater plan  
18 could not have been done without purchase of land  
19 which required legislative approval. It was too  
20 much work that had to be done.

21 THE COURT: Okay.

22 MR. SOROSKY: And so that concerns that.

23 So then we'll get into the Senate seat. We  
24 will divide the Senate seat, the Senate seat can be  
25 divided into two, there's the Valerie Jarrett and



1 and Jackson.

2 THE COURT: Right.

3 MR. SOROSKY: First on the Jackson theme, the  
4 only witness we would call would be Congressman  
5 Jackson.

6 THE COURT: Okay. This is what I assumed  
7 when you were talking to me about powerful people.

8 MR. SOROSKY: No, there's more. There's  
9 more. Congressman Jackson, we're not calling any of  
10 the other Indian businessmen. Those are the only  
11 two, those are the only two categories of people.

12 Concerning the Valerie Jarrett and the Senate  
13 seat, we would be calling Rahm Emanuel --

14 THE COURT: Who?

15 MR. SOROSKY: Rahm Emanuel.

16 THE COURT: Okay.

17 MR. SOROSKY: And perhaps Alexis Giannoulis.  
18 Where Giannoulis comes in is, after you Balanoff is  
19 rejected -- or after what occurred, just to refresh  
20 your memory is, when Balanoff first puts in the  
21 request for Valerie Jarrett, Blagojevich kind of  
22 stalls it, Balanoff assumes that stall was a  
23 rejection and reports back. There truly was,  
24 apparently, a stall by Blagojevich because about a  
25 week later Blagojevich calls and they said, oh,

1 she's already taken a job in the administration, so  
2 Blagojevich says well, that's interesting, and  
3 Balanoff says well, I'll talk to her again, but I  
4 think the ship has run.

:05AM

5 THE COURT: Right.

6 MR. SOROSKY: So when he gets a hold of  
7 Jarrett, apparently she's with Giannoulas. You  
8 follow?

9 THE COURT: Right.

:05AM

10 MR. SOROSKY: So, supposedly, when  
11 Giannoulas was interviewed he said that Balanoff  
12 said one wasn't for the other, you know, something  
13 along those lines, just to refute that one for  
14 another, that's a very narrow thing like that.

:06AM

15 And are we missing anything?

16 MS. KAESEBERG: I mean, there's people that  
17 we're still trying to track down that we don't know.

:06AM

18 MR. SOROSKY: Now, just so you're clear, so  
19 you know, with the defense of this Jesse Jackson  
20 allegation, it would be the defense's position that  
21 at this time there was this attempted last-minute  
22 push to do the Madigan deal but he got arrested  
23 before it would be consummated, and I suppose the  
24 best we could get out of Emanuel -- we haven't met  
25 with him yet, but to be realistic, the best we could

:06AM

1 get out of Emanuel was we knew about the deal and he  
2 was ready, willing, and available to do what he  
3 could to put it through because he felt it would be  
4 just a good thing for everyone, I don't know how  
5 else to put it, something along those lines, that's  
6 about the best we could get.

7 THE COURT: Yeah. Okay.

8 MR. SOROSKY: I'm just telling you.

9 THE COURT: No, that's fine.

10 MR. SOROSKY: Anyone I leave out?

11 MS. KAESEBERG: Durbin?

12 MR. SOROSKY: Durbin, he's a more marginal  
13 witness. Durbin would say that apparently there was  
14 a meeting, there's no doubt that this meeting  
15 occurred because this is in the 302's, between  
16 Axelrod, Durbin and Emanuel in early December, and  
17 the three of them apparently said Jesus, you know,  
18 maybe we should do what we can to assist in this  
19 Lisa Madigan thing. It was almost nothing more than  
20 over a cup of coffee or something like that.

21 THE COURT: Yeah.

22 MR. SOROSKY: But that meeting did occur. I  
23 think Emanuel says that he was there and the meeting  
24 occurred and Axelrod and Durbin were there, I don't  
25 think the government is going to question the

1 truthfulness of that meeting. I don't think there  
2 is a question of that because all three said it  
3 occurred.

4 THE COURT: Yeah. And some of this I  
5 understand why you're putting in, but there's none  
6 of it in which -- and the government can use it,  
7 too. So I don't see this as --

8 MS. KAESEBERG: There is a couple of minor  
9 witnesses too --

10 MR. SOROSKY: We left out?

11 MS. KAESEBERG: I'm just looking at my list.  
12 With regard to road builders and the tollway, a man  
13 named Ed Smith, he's a labor leader in Springfield,  
14 he had a conversation with the governor in mid  
15 November about the capital bill, the Lisa Madigan  
16 deal, and he addresses both issues. So he would be  
17 someone that's on the list as of now. And then  
18 there's another person -- unfortunately, I know  
19 Elliot added him to our list.

20 MR. SOROSKY: Dvorak.

21 MS. KAESEBERG: Dvorak on the Senate seat  
22 issue, but I'm not exactly sure --

23 MR. SOROSKY: He's a Krozel type, apparently  
24 he wasn't involved.

25 Now, the next question is, if Blagojevich

1 testifies and Mrs. Blagojevich testifies, do we need  
2 the whole day for what tapes are admissible or not  
3 admissible, that type of thing?

4 MS. KAESEBERG: We would have additional -- I  
5 know last time I believe you agreed that we could  
6 admit 12 and there were 5 conditional calls. We  
7 have approximately 30 that we have looked at and  
8 reviewed that we would want to put in addition to  
9 those.

10 THE COURT: That one is a little soon to deal  
11 with. First of all, we're going to deal with that  
12 on the record, just on that's what you're offering,  
13 we can do that in open court, and then you can send  
14 it to the government.

15 So what I think you should do is cut this  
16 down to what you think is the bare minimum. The  
17 truth is is that what he said on the tapes, even if  
18 he's on the witness stand, arguably -- in fact, it  
19 is hearsay, but I'm not going to exclude them if  
20 he's standing there and saying this is my  
21 explanation for this. And he's going to have to do  
22 a fair amount of explanation about what he said,  
23 anyway, so there will be some limited use of it  
24 permitted, which was my point in the first trial,  
25 that yeah, it's still hearsay but you can cross

1 examine on what it was he said.

2 So as a matter of principle, I'm not ruling  
3 it out, and if there's a more or less restrained use  
4 of it, the jury doesn't have to sit there for four  
5 hours listening to this stuff, this is fine.

6 And, you know, the government can do whatever  
7 they can to beat you over the head with it, and  
8 that's fine, and you can beat the government over  
9 the head with it, and we can deal with it that way.

10 And because a core issue in this, if he gets on the  
11 witness stand, is did they believe him, and it's not  
12 the technicalities of who said what, when, and under  
13 what circumstance, it's whether they believe his  
14 defense.

15 MR. SOROSKY: Now, the next thing is, these  
16 witnesses say they can't be here Monday.

17 THE COURT: Who says that?

18 MR. SOROSKY: All these witnesses.

19 MS. KAESEBERG: We are trying to get them. I  
20 mean, I can't even think of one who was  
21 affirmatively said they could.

22 MR. SOROSKY: Ironically, the witness who  
23 seems the most likely to come in Monday is Rahm.  
24 Jackson said Wednesday.

25 MS. KAESEBERG: Durbin is a more of a minor

1 witness. His lawyer indicated he is not so happy to  
2 come.

3 THE COURT: Now, the question is, since you  
4 have at least to my mind alleviated the government's  
5 concern about 30 witnesses, the question is is are  
6 you willing to let me front any of these?

7 MR. SOROSKY: Well, we don't mind telling  
8 that to the government, but I don't want --

9 THE COURT: I grant you that.

10 MR. SOROSKY: Fine. Sure.

11 MS. KAESEBERG: You mean all of them?

12 THE COURT: No, no, whichever ones you want.

13 MS. KAESEBERG: Okay.

14 THE COURT: If you tell them all, that's  
15 fine, if you don't tell them all, you have to tell  
16 them it's not all but these are the ones we know  
17 now.

18 MS. KAESEBERG: I don't mind giving them a  
19 number and then some of the ones that are going to  
20 be more of an issue, some of the minor ones we could  
21 probably announce. You know, we'll tell them  
22 whenever you want us to give it to them, a day or  
23 two ahead of time. Whatever you think, Shelly.

24 MR. SOROSKY: Being realistic, we agree only  
25 if it goes the way the government does it, who are

1 the only potential witnesses on Monday? John Filan  
2 and Rahm Emanuel, so let's just tell them that.

3 Do you see anyone else on Monday,  
4 realistically?

:18AM

5 MS. KAESEBERG: No.

6 And a couple of the people we've been in  
7 contact with, we're having difficulty with many of  
8 them. So my fear is if it's known, they'll make it  
9 harder for us to actually get them here.

:18AM

10 THE COURT: You just advise the government,  
11 because they advise you, sometimes they've done it  
12 on the record at the end, but most of the time --

13 MR. SOROSKY: I'll just tell them Rahm  
14 Emanuel.

:18AM

15 THE COURT: That's fine. And then I think  
16 we'll go back on the record and we'll do scheduling  
17 for the instruction conference, which because of  
18 certain scheduling difficulties with some of the  
19 witnesses, will be done on Monday, which we'll do in  
20 open court. And then that's it, unless anything  
21 comes up.

:18AM

22 MS. KAESEBERG: My sense in talking to  
23 Emanuel's lawyer, I don't mind telling the  
24 government this, but could be Monday. My sense is  
25 he's really going to have a difficulty getting here

:19AM



1 Monday. There's a possibility he can do it, but --

2 (The following proceedings were had out of the  
3 presence of the jury in open court:)

4 (Brief pause).

:15AM

5 THE COURT: Counsel, are we ready?

:16AM

6 I have conferred off the record with defense  
7 counsel and I don't anticipate that we will have a  
8 lot of delay dealing with pre-witness matters. And  
9 the defense is essentially following the same  
10 practice you followed, which is to advise you  
11 basically who the next day's witnesses are likely to  
12 be with no guarantee. And that's fine, too. It's a  
13 practice we followed throughout the trial.

:16AM

14 There may be some scheduling issues, but my  
15 belief is that since we are nearing the end, we  
16 should do witnesses when we can do witnesses, and if  
17 this means it's a short day for the jury, that's  
18 fine. I don't think the jury is going to mind it.

:17AM

19 And particularly if we have some difficulty on  
20 Monday, we probably have an hour, hour and a half on  
21 the instructions, maybe more. So we'll do that in  
22 the spare spaces. That is also the time where we  
23 will deal with the defense's customary motion at the  
24 close of the government's case. So I think we'll be  
25 okay on that.

:17AM

1           Sometime on Tuesday or maybe toward the end  
2 of Monday they will give you a list of their  
3 remaining witnesses. So I think, basically, as  
4 proposed to me by the defense, it seems to me to be  
5 a reasonable method of proceeding and that's the way  
6 we'll proceed.

7           The written motion at the close of the  
8 government's case, you can do that, if you wish,  
9 simply by listing what it is that you want to raise  
10 and then you can supplement it orally.

11           MS. KAESEBERG: Okay. Thank you.

12           THE COURT: That will save you a little time  
13 and effort.

14           MS. KAESEBERG: Thank you.

15           THE COURT: Issues that you want to raise?

16           MR. SCHAR: I guess several, Judge. And I'll  
17 knock them out as quickly as I can.

18           The issue of the instructions, we had given  
19 you a binder which lays it out by tab. Actually  
20 we're proposing that a juror get a binder similar to  
21 that for ease of use. Obviously, that not a  
22 decision that needs to be made today, but,  
23 organizationally, we think it's not controversial  
24 and neutral and hopefully would help organize the  
25 instructions for them.

1           In terms of the defense case, Judge, at this  
2 point we don't have any exhibits that have been  
3 offered or tendered to us. I don't know if they  
4 plan on offering any, but that also includes phone  
5 calls that they might anticipate playing,  
6 transcripts. And as you might recall last time, we  
7 spent quite a bit of time addressing the book of  
8 relevance and admissibility of a number of different  
9 calls. Maybe they don't intend on playing any calls  
10 with any witness.

11           THE COURT: what they have addressed to me  
12 is, the volume of materials is likely to be  
13 significantly less than it was last time. I had  
14 made conditional rulings with respect to some of  
15 them, which I'm likely to adhere to, and we'll see  
16 what else is submitted.

17           There were in the last time some pages that I  
18 think not even the defense intended to ask for, so I  
19 don't think we're going to have to face that. And  
20 there are conditions under which, as I said at the  
21 first trial, I would be willing to permit the  
22 playing, and I still might be willing, that view I  
23 have not changed.

24           So I think they will proceed to give you a  
25 tentative list and we'll try to deal with that on

1 Monday if it's necessary for us to deal with.

2 MR. SCHAR: That would be ideal, Judge.

3 Because, obviously, I don't anticipate their need to  
4 call witnesses to put in transcripts, but that  
5 would, obviously, require us to stipulate what  
6 they're accurate and we're not in a position to do  
7 that at this point.

8 THE COURT: That's fine. We'll have time to  
9 deal with that.

10 Anything else you wanted to do raise?

11 MR. SCHAR: No, Judge, I think most of the  
12 other issues really depend whether the defendant is  
13 going to testify. I think if that ends up being the  
14 decision, there are a variety of other different  
15 issues related to some privilege and other things  
16 that we flagged for you the first time that will  
17 come back into play, but until the final decision is  
18 made in that regard, I don't think we need to  
19 address it now.

20 THE COURT: I think you meant to say when an  
21 initial decision is made, because what happens with  
22 the issues you raise might possibly alter the  
23 decision one way or the other. So, basically,  
24 accepting your meaning as that, I think we're fine.

25 Anything else anybody else want to raise?

1 MR. SOROSKY: Yes, based on your guidelines,  
2 I think there are a few topics we have to meet with  
3 you again at sidebar to go over.

4 THE COURT: Sure.

5 (Proceedings heard at sidebar on the record.)

6 MR. SOROSKY: There are two topics I want to go  
7 over with you and then however you want to  
8 handle it.

9 THE COURT: Yeah.

10 MR. SOROSKY: The first is, if we were to  
11 call Robert Blagojevich as a witness to  
12 fundamentally repeat substantially what he testified  
13 to in the first trial, Mr. Ettinger has indicated he  
14 would take the Fifth amendment. So the issue then  
15 is, one, is he unavailable, and if he is unavailable  
16 how do we get this transcript in, that's issue  
17 number one. I'm not saying you have we address it  
18 this second.

19 THE COURT: Interesting point.

20 MR. SOROSKY: Now, second, we spoke to  
21 Ettinger, what do you want from them to indicate  
22 that he's unavailable?

23 THE COURT: We could do this in front of  
24 them.

25 MR. SOROSKY: What?

1 THE COURT: We could do this one in front of  
2 them now.

3 MR. SOROSKY: No, no.

4 THE COURT: Is this one we can't do in front  
5 of them?

6 MR. SOROSKY: No, we can. We can do it in  
7 front of them, I just wanted -- no, we can it in  
8 front of them, I just wanted to tell you.

9 The next thing is, should Blagojevich  
10 testify, would the government be able to impeach him  
11 with his --

12 THE COURT: Let's bring him here.

13 MR. SOROSKY: What?

14 THE COURT: Let's bring him here.

15 MR. SOROSKY: Okay. Bring the prosecution  
16 over.

17 You want to do this in open court or we'll  
18 mention it here first?

19 THE COURT: We'll mention it here.

20 (Government counsel joins sidebar:)

21 THE COURT: The two issues that were  
22 raised --

23 MR. SOROSKY: Recently just now.

24 THE COURT: -- just now, they can be raised,  
25 obviously, in your presence.

1 MR. SOROSKY: The first is --

2 THE COURT: Robert Blagojevich.

3 MR. SOROSKY: If we were to call Robert  
4 Blagojevich as a witness, Michael Ettinger has  
5 indicated he would take the Fifth Amendment because  
6 of the dismissal with prejudice.

7 MR. SCHAR: Without prejudice.

8 MR. SOROSKY: So if he would take -- assuming  
9 the government doesn't change its position as to the  
10 status of the dismissal, we would want to call him  
11 as a witness to say substantially, you know, what he  
12 said in his first trial, and we would ask that the  
13 judge declare him unavailable to present him and  
14 then try to get his transcript in.

15 So the first thing I said to the judge is,  
16 what material do you want from Ettinger and Robert  
17 Blagojevich to firmly establish that he is taking  
18 the Fifth Amendment and then, secondly, if it is,  
19 what is your position on that whole topic. You  
20 don't have to answer today but Monday ...

21 THE COURT: The issues you'll have to address  
22 is whether his claim of privilege makes him  
23 unavailable. If the claim of privilege makes him  
24 unavailable, does his transcript go in, read from  
25 the witness stand. If it goes in, does it go in in

1 part or in whole, the passages that are objected to.  
2 And then the issue which Mr. Sorosky has not brought  
3 out is whether the jury knows the disposition of his  
4 case.

5 And the reason this is tricky is, there is  
6 somebody who, theoretically, is off the hook and yet  
7 is claiming privilege, which is a funny  
8 circumstance.

9 MR. SOROSKY: Well --

10 THE COURT: Then there's one last thing, and  
11 that would be, I think, to the defense that you give  
12 him use immunity against his testimony here, which,  
13 interestingly enough, many years ago in state court  
14 I did as a prosecutor, but I had a unique  
15 circumstance, and that is every witness I called  
16 also had use immunity, so I gave one to the defense,  
17 it blunted the defense argument for no good use to  
18 me, I lost anyway, so I remembered that. I don't  
19 remember the cases I won, I remember the ones I  
20 lost.

21 MR. SOROSKY: Assuming, assuming, just  
22 responding to the issues about whether he is off the  
23 hook or that type of thing, the Fifth Amendment, if  
24 someone read his testimony, his testimony is he  
25 lives in Nashville and if they're saying he is



1 unavailable, it's very conceivable that the jurors  
2 just may presume he lives in Nashville and that's  
3 why he is unavailable and that whole topic could --

4 THE COURT: We'll see.

5 MR. SOROSKY: That is a potential.

6 THE COURT: We'll see.

7 MR. SOROSKY: Next issue is, should the  
8 defendant testify, would he be subject to  
9 impeachment by the conviction in the first trial,  
10 that issue. And, obviously, I don't want to say  
11 unique, but a little peculiar because --

12 MR. SCHAR: Judge, we actually have a motion  
13 on this. The case law is pretty clear that he is  
14 subject to impeachment, and we're happy to file a  
15 motion in limine. We haven't filed it yet, it's  
16 ready to go.

17 THE COURT: It's interesting. I wondered  
18 about that because, of course, he is not convicted,  
19 technically, until he is sentenced, and I didn't  
20 bother to look up the law.

21 MR. SCHAR: We have the law. Do you want us  
22 to file the motion?

23 THE COURT: Give me a list of cases.

24 MR. SCHAR: I tell you what --

25 THE COURT: I occasionally like to read them

1 myself.

2 MR. SOROSKY: How about if you do it the old  
3 fashioned way and just give the judge and the  
4 defense a copy of your motion, how's that?

:35AM

5 MR. SCHAR: I'll do it however you want.

6 THE COURT: Just send me an e-mail with the  
7 cases.

8 MR. SCHAR: I'll hand you both a copy.

:35AM

9 MR. SOROSKY: Let's do it the old fashioned  
10 way.

11 MR. SCHAR: And we'll call it a draft copy.  
12 (Brief pause).

13 THE COURT: Okay.

14 Did you have something else?

:35AM

15 MR. SOROSKY: Anything else that you can  
16 think of? Touchy little peccadillos?

17 MR. SCHAR: I don't think so, Judge.  
18 Obviously, if the defendant ultimately makes an  
19 initial decision to testify, I think there are going  
20 to be a number of kind of sensitive issues related  
21 to -- particularly if he is going to testify about  
22 his understanding or what he thought the words were  
23 telling, but we can cross that bridge when we come  
24 to it.

:36AM

:36AM

25 MR. SOROSKY: Can we do this now? Since

1 everyone on this side is anticipating what the other  
2 side is going to do and since it's retrial, maybe it  
3 would be provident now for the government to recite  
4 some of the things that they feel that defendant  
5 cannot say if he testifies so we know where they're  
6 at.

7 THE COURT: Well, one thing --

8 MR. SOROSKY: Or the Court can.

9 THE COURT: One thing I've actually ruled  
10 upon, and that is he, obviously, cannot claim that  
11 he relied upon somebody's advise, because he never  
12 got advise. What he can say is what John Cheek  
13 said, which is I honestly believed that what I was  
14 doing was legal.

15 MR. SOROSKY: Now, let me just interrupt you  
16 right now. Can one of the reasons --

17 THE COURT: I'm getting to that. Believe me,  
18 I'm getting to that.

19 MR. SOROSKY: Okay.

20 THE COURT: I believed it, I realized today  
21 after all this stuff, probably wrong about that, I  
22 believed it. Cheek in his income tax case, of  
23 course, believed it forever. He had one moment at  
24 trial where he said that the only way he would  
25 concede that he was wrong is if the nine justices of

1 the Supreme Court told him he was wrong, and then I  
2 sent the jury out, and I gave him a copy of the  
3 opinion, because he apparently had not read a  
4 portion of the opinion which says all of the other  
5 arguments against the income tax laws made by Cheek  
6 are frivolous and not supposed to address them. And  
7 I told him, this is your case, they were telling  
8 you, the nine justices, personally, that. And there  
9 was this very long silence, it was one of those rare  
10 moments in the courtroom. So he says I believed  
11 this stuff, then he can use even the ammunition that  
12 the prosecutor wants to use, I'm a lawyer, I went to  
13 law school. Could I have been wrong, yeah, but I  
14 really believed this stuff at the time, this is what  
15 I thought. Then the issue arises is, does the  
16 government get to cross-examine him. So you're a  
17 lawyer, you know, did you consult a lawyer, did you  
18 consult some expert, did you do this, did you do  
19 that.

20 And in this particular case, I think that  
21 that's fair impeachment, and it's a good reason why  
22 I don't think he wants to testify that there were a  
23 lot of lawyers in the room and that nobody  
24 protested. It might seem like an attractive thing  
25 to say if you're sitting where you're sitting, but

1 it isn't, in fact, attractive, because the counter  
2 is sitting in a room full of lawyers, did you ever  
3 say to them. Now, maybe he did something that is  
4 unrecorded where he's going to say yeah, as a matter  
5 of fact. But, basically, we're going to deal with  
6 that issue when it comes up, because he is entitled  
7 to say, I think, it is honest belief.

8 Now, if you want to research Cheek and see if  
9 it actually applies here, you're welcome to do that.  
10 Because the truth is is I am basing this essentially  
11 on my understanding of the Cheek case, which I  
12 remembered quite well because I tried it the second  
13 time, and then maybe there's an issue where I don't  
14 see it.

15 But that's basically where we wind up. And  
16 then there's one of two paths he can go down. One  
17 path is is that I thought it was legal and  
18 everything they say I did I did, but I thought it  
19 was legal. And the other path he goes down is the  
20 path that was suggested in opening statement, which  
21 is yeah, I did all of this stuff but I really didn't  
22 take any affirmative step and I just decided at the  
23 end not to go through with it, at which case your  
24 argument has been done, he didn't go through with  
25 it. It's a fair question for the jury to deal with,

1 and a question that if he testifies he is going to  
2 have to answer.

3 But, basically, this is my thinking about it  
4 and I'm telling you this thinking about it not to  
5 dictate the results, but to give you a chance to  
6 tell me I'm wrong or, yeah, you're right but this is  
7 where we think the line should be drawn and somebody  
8 else has a different version of the line. So I want  
9 you to know where I start, may not be where I finish  
10 at but this is where I start.

11 MR. SOROSKY: Can he say, I'm just asking,  
12 that one of the reasons why he believed no one said  
13 he couldn't do it, but all the people he talked to  
14 are top of the game in their field or whatever?

15 THE COURT: He can say that no one said I  
16 couldn't do it.

17 MR. SOROSKY: Or no one said it was --

18 THE COURT: But, you know, he's got some --  
19 the tenor of what he is doing on the tape is  
20 difficult to prepare him for cross on that one.  
21 But, you know, if that's what he wants to rely on,  
22 which is not dissimilar from what Cheek said, you  
23 know, "I would accept this only if the nine justices  
24 of the Supreme Court told me," well, in this  
25 case he picked an unfortunate example, but with a

1 lot of tax protesters, they haven't read the opinion  
2 and it doesn't involve him personally, and if that's  
3 his standard, I think he can try that, he can try  
4 that.

5 And the other thing he can try, although --  
6 well, something you need an expert for and you  
7 haven't designated one, so I'm not going raise it.

8 MR. SCHAR: Obviously, Judge, the complicated  
9 factor in all of this is, I understand what he wants  
10 to say. Of course, from our perspective, there are  
11 all types of doors that can be opened in  
12 relationship that he had outside counsel, including  
13 an attorney that really complicates things if he is  
14 here today, who if he really cared he could have  
15 called up in a heartbeat and said --

16 THE COURT: Yes, I think they fully  
17 understand. The problem he has with not asking by  
18 the guy who spends an enormous amount of time on  
19 tape asking. Because that's basically where this  
20 goes, is this a good idea and never asks is it  
21 illegal. And, you know, to be effective on the  
22 witness stand he is going to have to present himself  
23 as a flawed person, and he's going to have to  
24 concede a lot of flaws, and maybe suggest another  
25 one, which is why if he goes on the stand he has a

1 chance, you know. It's a deeply flawed person,  
2 maybe even a jerk, but not a criminal.

3 okay?

4 MR. SCHAR: Yes.

5 THE COURT: Anything else?

6 Let's go back out there on the record.

7 (The following proceedings were had out of the  
8 presence of the jury in open court:)

9 THE COURT: what we've done at sidebar, and  
10 we did it at sidebar because counsel wanted to raise  
11 issues, possibilities of issues that have not yet  
12 arisen, and may never arise and for which no  
13 decision is called for, but we now have a list of  
14 possible issues that might arise so that the  
15 attorneys can do whatever research they need to do,  
16 we won't have to wait for briefing, and some of them  
17 can make decisions based on what that research  
18 reveals. And we probably will deal with these  
19 issues, if they are raised, either at the end of the  
20 day Monday or probably at the beginning of the day  
21 on wednesday. So that's the scheduling for that.

22 Everybody has the possible list. Obviously,  
23 I don't want to deal with any of that list until I  
24 know that it's moved from the possible to the actual  
25 in which case I can read some law, too.



1 Anything further?

2 MR. SCHAR: No.

3 MR. SOROSKY: Nothing further.

4 THE COURT: Okay. I will see you Monday at  
5 9:30.

6 Thanks.

7 THE MARSHAL: All rise.

8

9

10 (Adjournment taken from 11:40 o'clock p.m. to  
11 9:30 o'clock a.m. on May 23, 2011.)

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I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT  
FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED  
MATTER

/s/Blanca I. Lara

date

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Blanca I. Lara

Date